

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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MAGMA HOLDING, INC., a Nevada Corporation, META LAB, INC., a Nevada Corporation,

Case No. 2:20-cv-00406-RFB-BNW

## **ORDER**

### **Plaintiffs/Counter Defendant,**

V.

KA TAT "KARTER" AU-YEUNG, an individual,

### **Defendant/Counter Claimant.**

KA TAT "KARTER" AU-YEUNG, an individual,

### **Third Party Plaintiff/ Counter Claimant**

V.

YUXIANG GAO, an individual; QIAN XU; an individual; MOTI TECHNOLOGY CO. LTD, a Cayman Islands company; DOES I-X inclusive; and ROE ENTITIES 1-10, inclusive,

#### **Third Party-Defendants/Counter Defendants.**

## I. INTRODUCTION

Before the Court is Defendant/Counter Claimant Ka Tat (“Karter”) Au-Yeung’s Motion to Appoint Receiver and Plaintiffs/Counter Defendants Magma Holding, Inc and Meta Lab Inc.’s (“Magma” and “Meta”, collectively “Plaintiffs”) Motion to Dismiss Karter’s Countercomplaint. ECF Nos. 36, 49. For the following reasons, the Court grants the motion to appoint a receiver and grants the motion to dismiss in part.

1           **I. PROCEDURAL BACKGROUND**

2           Plaintiffs filed their complaint against Defendant Ka Tat “Karter” Au Yeung (“Karter” or  
 3           “Defendant”) on February 26, 2020. ECF No. 1. Karter was served on February 27, 2020. ECF  
 4           No.5. In their complaint, Plaintiffs bring conversion, embezzlement, claim and delivery, unjust  
 5           enrichment, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith  
 6           and fair dealing, violations of the Lanham Act (15 U.S.C. § 1125(a)(1)(a)); violations of the  
 7           Computer and Fraud Abuse Act (18 U.S.C. § 1030(a)(2)), tortious interference with contractual  
 8           relations, violations of the Defend Trade Secrets Act (18 U.S.C. § 1836), and misappropriation of  
 9           trade secrets claims. ECF No.1. Plaintiffs also seek injunctive and declaratory relief. Plaintiffs  
 10          filed an emergency ex parte motion for a temporary restraining order on March 12, 2020. ECF  
 11          No.8. The Court granted the ex parte motion on March 16, 2020. ECF No. 13.

12          Defendant Ka Tat “Karter” answered the complaint on March 20, 2020. ECF No. 16. The  
 13          answer also included a counterclaim against Plaintiffs and third-party claims against Third Party  
 14          Defendants Yuxian Gao (“Michael) and Qian Xu (“Daniel”). Id. Karter filed an amended third-  
 15          party complaint adding third-party defendant Moti Technologies, Inc. on March 24, 2020. Karter  
 16          moved for appointment of a receiver on March 25, 2020. ECF No. 36. Karter also filed a response  
 17          in opposition to Plaintiffs’ ex parte motion for a temporary restraining order on that same date.  
 18          ECF No. 35. The Court held a hearing on the motions on March 26, 2020. The Court extended the  
 19          effect of the temporary restraining order for an additional two weeks and ordered the parties to  
 20          respond to briefing. ECF No. 41. Plaintiffs filed their response to Karter’s motion to appoint a  
 21          receiver on April 2, 2020. ECF No. 51. Plaintiffs also filed their reply to Karter’s opposition to the  
 22          motion for a temporary restraining order. ECF No. 53. Plaintiff moved to dismiss Karter’s  
 23          counterclaims on April 2, 2020. ECF No. 49. The motion was fully briefed. ECF Nos. 64, 65. The  
 24          Court dissolved the temporary restraining order on April 9, 2020. ECF No. 59. A hearing on the  
 25          motions was held on April 22, 2020. This written order now follows.

26

27           **II. FACTUAL ALLEGATIONS**

28          Karter alleges as follows in his countercomplaint: Karter first met Third-Party Defendant

1 Qian Xu, or “Daniel” in or around April 2015 when they were both working at OutletPC.com in  
 2 Henderson, Nevada. ECF No. 38, Amended Countercompl. at ¶ 5. Karter and Daniel eventually  
 3 began discussing the possibility of starting an ecigarette business together. Id. As part of their  
 4 proposed business plan, Karter and Daniel agreed that they would share duties related to sales,  
 5 marketing, and accounting for their new e-cigarette venture. Id. ¶ 7. Karter and Daniel further  
 6 agreed that Daniel would focus on leveraging his supply chain connections in China, whereas  
 7 Karter would focus on e-commerce, operations, warehousing, purchasing and accounts payable.  
 8 Id. ¶ 8. Karter would later come to learn that Daniel’s “supply chain connections in China”  
 9 primarily referred to Third-Party Defendant Yuxian Gao, or “Michael” – Daniel’s long-time friend  
 10 from college. Id. ¶ 9. On or about May 23, 2015, Karter purchased the eightvape.com domain from  
 11 GoDaddy.com. Id. ¶ 11.

12 On or about October 8, 2015, an Operating Agreement for Eightcig was drafted utilizing  
 13 the Nevada Secretary of State Website (the “Eightcig Operating Agreement”). Id. ¶ 13 -15. The  
 14 Eightcig Operating Agreement listed the original members of Eightcig–Karter, Daniel and Mr.  
 15 Chan, in addition to two new members – Michael and his friend and business associate from China,  
 16 Xiangwei Wang. Id. Michael and Mr. Wang provided supply chain and logistics support for  
 17 Eightcig products from Shenzhen, China through a company they owned together–Troogle  
 18 Technology LTD (“Troogle”). Id.

19 The Eightcig Operating Agreement listed the Membership Interest percentages in Eightcig  
 20 as: Daniel – 21.67%; Karter – 21.66%; Mr. Chan – 21.66%; Michael – 17.5; Mr. Wang – 17.5%.  
 21 Id. ¶ 16. The operating agreement required unanimous approve by all disinterested members for  
 22 any transactions between members of the LLC and full disclosure of all material facts. Id. ¶ 17.  
 23 The agreement also required unanimous approval to withdraw or transfer membership interests.  
 24 Id. ¶ 18-20. In early 2016, Mr. Chan’s visa expired, so he returned to China and voluntarily  
 25 withdrew from Eightcig. Id. ¶ 21. As part of his voluntary withdrawal from Eightcig, Mr. Chan’s  
 26 sold his Membership Interests back to the company, and Michael insisted the Members redistribute  
 27 equally, rather than in proportion to their respective ownership percentages. Id. ¶ 22.

28

At some point thereafter, although the circumstances and timing remain unclear, Michael claims to have acquired his friend and business partner—Mr. Wang’s Membership Interests in Eightcig. Id. ¶ 23. Karter disputes Michael’s claims that he validly acquired Mr. Wang’s Membership Interests in Eightcig. Id. ¶ 23.

#### **i. The Success of EightCig**

Almost immediately after its formation in 2015, Eightcig became extremely successful. Id. ¶ 26. In 2018 alone, Eightcig reported gross revenue of \$44,946,905.00, and gross profit of \$4,731,632.00. Id. ¶ 27. Karter and the sales and marketing team he ran were responsible for virtually all of these sales. Id. ¶ 27. Karter was in charge of sales and virtually all of the day-to-day operations at Eightcig. Id. ¶ 20.

#### **ii. The Rollup of Eightcig**

In or around mid-2018, Karter alleges that Daniel and Michael worked together to devise a scheme to defraud Karter and fleece Eightcig by rolling it into a network of shadow companies which were secretly owned and controlled primarily by Michael and Daniel. Id. ¶ 30.

In order to accomplish their fraudulent scheme, Daniel and Michael decided to deceive Karter into believing that Eightcig was on the verge of financial failure so that Karter would agree to roll Eightcig into a new network of companies which would purportedly be utilized to attract new investors. Id. ¶ 31.

On or about July 16, 2018 at the Eightcig, Michael made the following alleged misrepresentations to Karter: a) the e-cigarette industry was facing imminent collapse because of purported new e-cigarette regulations working their way through the Food and Drug Administration of the United States Government; b) Eightcig was no longer viable as it was currently capitalized and positioned in the e-cigarette market; c) unless Eightcig obtained a quick

1 infusion of capital and was rolled into a new network of companies as Michael was demanding  
 2 Eightcig would not make it another year; d) Michael already had investors from China lined up  
 3 who were ready, willing and able to invest tens of millions of dollars into this new multi-company  
 4 structure; e) if Karter agreed to roll Eightcig into this new network of companies, the new  
 5 companies would immediately be worth approximately \$100,000,000.00; f) if Karter agreed to roll  
 6 Eightcig into this new network of companies, Karter's effective membership interest in the new  
 7 companies would be somewhere between 15% - 20%, but not less than 15%; and g) if Karter did  
 8 not agree to roll Eightcig into this new network of companies, Karter would have to immediately  
 9 buy-out Michael and Daniel from Eightcig. Id. ¶ 34.  
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 11

12 Karter alleges that Michael knew his representations to Karter were false. Id. ¶ 37 -39.  
 13 Daniel also echoed the same misleading representations. Id. ¶ 40. Karter reasonably trusted and  
 14 believed the misrepresentations. Id. ¶ 39, 45. Given that a buy-out of Michael and Daniel was not  
 15 possible, and because together Michael and Daniel represented the majority ownership of Eightcig,  
 16 and because Michael and Daniel told Karter in no uncertain terms that Karter did not have a choice  
 17 but to agree to roll Eightcig into a new network of companies, Karter felt he had no option but to  
 18 comply with Michael and Daniel's demands. Id. ¶ 49.  
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### **iii. The Incorporation of Magma and Dissolution of EightCig**

21 Karter later learned that Daniel had secretly incorporated Magma—the entity the Third-  
 22 Party Defendants intended to roll Eightcig into—several weeks prior on July 2, 2018 and secretly  
 23 made himself the president of Plaintiff/Counter-Defendant Magma. Id. ¶ 51.  
 24  
 25

Over the next several months of 2018, Michael and Daniel began bombarding Karter with  
 stacks of documents. Id. ¶ 52 - 60. Michael and Daniel falsely represented to Karter that the  
 26 documents they were bombarding him with were necessary to accomplish the roll-up of Eightcig  
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1 in accordance with the representations and promises they made to Karter previously. Id. Michael  
 2 and Daniel expected Karter to sign every single document he was provided immediately, without  
 3 question or negotiation. Id. Often, the documents Karter was expected to sign were written in  
 4 traditional Chinese, a language in which Karter is not fluent. Id. Other documents only contained  
 5 a signature page. Id.

7 When Karter began to express concern regarding his lack of inclusion in the Eightcig roll-  
 8 up process and the sudden authoritarian tone Michael and Daniel began to take with Karter  
 9 regarding the roll-up process, Michael and Daniel began questioning Karter's loyalty. Id. Karter  
 10 would later learn that Michael and Daniel eventually began having Daniel and other individuals,  
 11 for example, Eva Wei, sign documents on Karter's behalf without his knowledge or approval. Id.  
 12

13 One document Karter contends contains a forged signature is a Confirmation Letter from  
 14 April 2019. Id. ¶ 63. The confirmation letter allegedly establishes that the purchase of the domain  
 15 name eightvape by Karter for was the exclusive use of Meta, Labs, Inc, a wholly owned subsidiary  
 16 of Magma. The second documents Karter contends is forged is a Confidential Information and  
 17 Invention Assignment, which forbids Karter from disclosing confidential information about the  
 18 company with other individuals. Id. ¶ 63.  
 19

20 **iv. Alleged Fraudulent Transactions on the Part of Third-Party Defendants  
 21 and Counter Defendants**

22 Karter later learned that Michael and Daniel had essentially plugged Eightcig into a  
 23 network of shadow offshore Cayman and Chinese entities owned and controlled primarily by  
 24 Michael and Daniel, so they could improperly and illegally funnel money to and from these  
 25 entities. Id. ¶ 65.  
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1           Karter would also learn that Michael and Daniel were representing that Eightcig essentially  
 2 became Magma – a Nevada entity which purportedly was wholly owned by a Cayman entity –  
 3 Third-Party Defendant MOTI Technology Co., LTD (“MOTI”). Id. ¶ 66.  
 4

5           Karter would also learn that MOTI, in turn, was wholly owned by several Cayman entities,  
 6 one of which was set up for Karter, one of which was set up for Michael, one of which was set up  
 7 for Daniel, and several other entities which were set up for so-called “investors.” Id. ¶ 67.  
 8

9           As Karter continued to try and put all the pieces of the alleged fraud together, he also  
 10 continued to run the day-to-day operations, and was responsible for virtually all of the  
 11 administrative functions for Counter Defendants Magma, and its wholly owned subsidiary, Meta,  
 12 as he had done for Eightcig. Id. ¶ 69

13           As part of his functions, Karter was a signatory on both the Magma and Meta bank  
 14 accounts, and he was responsible for overseeing Magma and Meta payroll and accounts payable.  
 15 Id. ¶ 72. Karter began noticing suspicious transfers of large sums of money being wired between  
 16 Magma, Meta and the various network of Cayman and Chinese entities owned and controlled by  
 17 Michael and Daniel. Id. ¶ 74. In or around October 2019 when Karter began requesting information  
 18 from Michael about the suspicious transactions to and from Magma and Meta’s bank account(s),  
 19 Michael and Daniel sent Qin Gong, a financial controller from Leiyuan Technology, LTD (a  
 20 company owned in part and fully controlled by Michael) to oversee Magma and Meta’s accounting  
 21 department. Id. ¶ 74. Many of the wire transactions were to a Chinese-based company called  
 22 Troogle and to the Zhen Fund and its affiliates. Id. ¶ 75. The transactions also included payments  
 23 to Michael and Daniel for “consulting fees” despite there being no arrangement for consulting fees  
 24 in place for Magma and Meta. Id. ¶ 75.  
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1 By the beginning of 2020, Karter had seen enough suspicious activity with respect to the  
 2 Magma and Meta finances that he started to become worried Michael and Daniel were violating  
 3 US tax laws and consulted with an accountant. Id. ¶ 86, 81. Karter also decided to move \$6 million  
 4 in funds from Magma to Meta's bank account for safekeeping with a memo titled Fraud Mitigation.  
 5 Id. ¶ 89. The accountant explained that the lack of sufficient documentation for the wire transfers  
 6 served as indicia for violations of tax and criminal laws. Id. ¶ 92. Karter forwarded the accountant's  
 7 conclusions to Michael and Daniel but they ignored the information and instead demanded that  
 8 Karter return a \$150,000 bonus he had given himself after 2019's record sales. Id. ¶ 97, 83-85.  
 9

10                   **v. Alleged Backdated Asset Purchase Agreement and Karter's Termination  
 11 and Transfer of \$6 million to Personal Account**

12                   On or about January 21, 2020, Karter learned that Daniel had secretly executed an Asset  
 13 Purchase Agreement sometime in 2019, but which was back-dated to December 28, 2018 and  
 14 which purported to sell certain of Eightcig's assets to Magma (the "Eightcig Asset Purchase  
 15 Agreement"). Id. ¶ 98. Karter was surprised because when Karter had previously asked Daniel  
 16 about the potential sale of Eightcig's assets to Magma, Daniel had provided Karter only with an  
 17 incomplete draft of a purchase agreement, which contained no details regarding timing, amounts,  
 18 or assets to be bought/sold. Id. ¶ 99. The Eightcig Asset Purchase Agreement was secretly executed  
 19 by Daniel on behalf of both Eightcig and Magma. Id. ¶ 98. Karter neither knew of, or approved  
 20 the Eightcig Asset Purchase Agreement or its terms. Id. ¶ 103. In late January 2020 as Karter  
 21 continued to work with an accountant to sort out Magma and Meta's finances and accounting,  
 22 Karter learned that Daniel instructed the employees not to cooperate or provide any financial  
 23 information to Karter. Id. ¶ 113. On or about February 4, 2020, Karter attempted to terminate a  
 24 Magma employee named Le Xiao, whom Daniel had installed at Magma, and whom Karter  
 25

1 strongly suspected was falsifying accounting records for Magma at Michael and Daniel's direction.  
 2 Id. ¶ 114. As Karter was in the process of terminating Mr. Xiao, Mr. Xiao called Daniel, who told  
 3 Karter and other Magma employees that Mr. Xiao reported "directly to China" and could not be  
 4 terminated. Id. ¶ 115.

5         Several days later on or about February 5, 2020, Karter learned that he had secretly been  
 6 replaced as the President, Treasurer, Secretary, Officer and Director on the Nevada Secretary of  
 7 State website for Magma and Meta. Id. ¶ 117. No notice was provided to Karter, nor was a  
 8 Directors or Shareholders meeting held where the Officers, Directors or Shareholders could vote  
 9 on the actions taken by Third-Party Defendants to purportedly remove Karter as the President,  
 10 Treasurer, Secretary, Officer and Director for Magma and/or Meta. Id. ¶ 118. Given Karter's  
 11 sudden and secret removal as an officer and director on the Nevada Secretary of State website for  
 12 Magma and Meta, Karter was reasonably concerned that the \$6,000,000.00 in the Meta bank  
 13 account may no longer be safe. Id. ¶ 119. As a result of these concerns, on or about February 6,  
 14 2020, Karter wired approximately \$6,000,000.00 from the Meta bank account to his personal  
 15 savings account. Id. ¶ 120.

19                   **i. The State Court Action**

20         On or about February 12, 2020, Karter filed a lawsuit in the Eighth Judicial District of  
 21 Nevada State Court, Case No. A-20-810395-B ("State Court Action") against the  
 22 Counterdefendants and Third Party Defendants alleging the claims he asserts in his  
 23 countercomplaint, including fraudulent/intentional misrepresentation, negligent  
 24 misrepresentation, breach of contract, breach of implied covenant of good faith and fair dealing  
 25 both tort and contract, breach of fiduciary duty, constructive fraud, civil conspiracy, unjust  
 26 enrichment, and declaratory relief.

1           The state court complaint sought that the \$6 million be interpled or that the court issue an  
 2 order restricting anyone from accessing the \$6 million until this dispute is resolved.  
 3

4           After Plaintiffs filed their ex parte temporary restraining order in this federal action, the \$6  
 5 million in funds has now been deposited with this Court.  
 6

7           **III.    LEGAL STANDARD**

8           **a. Motion to Dismiss**

9           An initial pleading must contain “a short and plain statement of the claim showing that the  
 10 pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The court may dismiss a complaint for “failure  
 11 to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In ruling on a motion  
 12 to dismiss, “[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and  
 13 are construed in the light most favorable to the non-moving party.” Faulkner v. ADT Sec. Services,  
 14 Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted).

15           To survive a motion to dismiss, a complaint need not contain “detailed factual allegations,”  
 16 but it must do more than assert “labels and conclusions” or “a formulaic recitation of the elements  
 17 of a cause of action . . . .” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp.  
 18 v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it contains  
 19 “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,”  
 20 meaning that the court can reasonably infer “that the defendant is liable for the misconduct  
 21 alleged.” Id. at 678 (internal quotation and citation omitted). The Ninth Circuit, in elaborating on  
 22 the pleading standard described in Twombly and Iqbal, has held that for a complaint to survive  
 23 dismissal, the plaintiff must allege non-conclusory facts that, together with reasonable inferences  
 24 from those facts, are “plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S.  
 25 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).  
 26

**b. Motion to Appoint Receiver**

“Appointing a receiver is an “extraordinary equitable remedy which should be applied with caution.” Canada Life Assur. Co. v. LaPeter, 563 F.3d 837, 844 (9th Cir. 2009) (internal citations omitted). There is no precise formula for determining when a receiver may be appointed. Id. Federal courts should consider a variety of factors when determining whether an appointment is warranted, including (1) whether the party seeking the appointment has a valid claim; (2) whether there is fraudulent conduct or the probability of fraudulent conduct by the party not moving for appointment of the receiver; (3) whether the property is in imminent danger of “being lost, concealed, injured, diminished in value, or squandered”; (4) whether legal remedies are inadequate; (5) whether the harm to the party moving for appointment would outweigh injury to the party opposing the appointment; (6) the moving party’s probable success in the action and the possibility of irreparable injury to the moving party’s interest in the property, and (7) whether the moving party’s interests sought to be protected will in fact be well-served by receivership. Id. The Court has broad discretion in deciding to appoint a receiver, however, and no one factor is dispositive. Id. While state law may provide the vehicle for the appointment of a receiver, federal law always governs the issues of whether to appoint a receiver. Id.

## IV. DISCUSSION

The Court first addresses Plaintiffs/Counter Defendants' Motion to Dismiss and then turns to the Motion to Appoint a Receiver.

**a. Motion to Dismiss**

Plaintiffs/Counter Defendants seek to dismiss Karter's civil conspiracy, unjust enrichment, declaratory relief, constructive trust, alter ego, and accounting claims.<sup>1</sup> For the following reasons, the Court grants Counter Defendants' Motion to Dismiss in Part and Denies it in part.

### i. Civil Conspiracy

<sup>1</sup> Karter also has a claim for appointment of a receiver, however that claim is addressed separately in the portion of this order addressing the motion to appoint a receiver.

1           An actionable civil conspiracy “consists of a combination of two or more persons who by  
 2 some concerted action, intend to accomplish an unlawful objective for the purpose of harming  
 3 another, and damage results.” Guilfoyle v. Olde Montmouth Stock Transfer Co., Inc., 335 P.3d  
 4 190, 198 (Nev. 2014) (citing Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 971  
 5 P.2d 1251, 1256 (Nev. 1998)).

7           Counter Defendants argue that a party is required to allege an underlying tort in order to  
 8 have an actionable claim for conspiracy, but the Nevada Supreme Court has never held that this is  
 9 a requirement. See Cadle Co. v. Woods & Erickson, LLP, 345 P.3d 1049, 1052 (Nev. 2015)  
 10 (noting that civil conspiracy may lie where “two or more persons undertake some concerted action  
 11 with the intent to commit an unlawful objective, not necessarily a tort.”).

13           Nevada law further recognizes that “agents and employees of a corporation cannot conspire  
 14 with their corporate principal or employer where they act in their official capacities on the behalf  
 15 of the corporation and not as individuals for their individual advantage.” Collins v. Union Fed.  
 16 Sav. & Loan Ass’n, 662 P.2d 610, 622 (Nev. 1983).

18           Under the facts as alleged, the Court finds that Counter Claimant Karter has pled an  
 19 adequate claim for civil conspiracy. The facts Karter pled established that Daniel and Michael  
 20 conspired to use Magma and Meta funds to unlawfully divest Defendant Karter of his interest in  
 21 Magma, formerly Eightcig, and that they did so for their individual advantage, rather than that of  
 22 the corporations. To the extent that this claim is inconsistent with Counter Claimant’s claim for  
 23 alter ego, parties may plead alternative theories of liability. Fed. R. Civ. P. 8(d)(2). The Court will  
 24 allow the claim to proceed.

26           **ii. Unjust Enrichment**

1           “Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the  
 2 defendant appreciates such benefits, and there is “acceptance and retention by the defendant of  
 3 such benefit under circumstances such that it would be inequitable for him to retain the benefit  
 4 without payment of the value thereof.” Certified Fire Prot. Inc. v. Precision Constr., 283 P.3d 250,  
 5 257 (Nev. 2012).

7           The Court finds that Karter has adequately pled a claim for unjust enrichment. Defendant  
 8 Karter alleges in his complaint that his interest in Eightcig was unjustly conferred onto Magma,  
 9 Meta, and the third-party defendants, and that it would be unjust for Magma and Meta to retain  
 10 those interests.

12           The Court rejects Counter Defendants’ arguments that the unjust enrichment claim cannot  
 13 lie because there is an express written agreement. Karter alleges in his complaint that the written  
 14 agreement at issue (the Eightcig Asset Purchase Agreement) is void and unenforceable. See  
 15 Leasepartners Corp. v. Robert L. Brooks Tr., 942 P.2d 182, 187 (noting that unjust enrichment  
 16 applies to situations where there is “no *legal* contract”) (emphasis added). The Court will therefore  
 17 allow the claim to proceed.

19           **iii. Declaratory Relief**

21           The Court notes that Defendant Karter’s counterclaims for declaratory relief are actually  
 22 claims are for injunctive relief. See Olagues v. Russionello, 770 F.2d 791, 803 (9th Cir. 1985)  
 23 (noting that “[t]here is a considerable difference between *ordering* a government official to  
 24 conduct his activities in a certain manner, and simply *pronouncing* that his conduct is unlawful  
 25 and *should* be corrected.”).

27           However, failure to plead the correct legal theory is not grounds for dismissal of a claim.  
 28 Johnson v. City of Shelby, Miss. 574 U.S. 10, 11 (2014) (“Federal pleading rules . . . do not

1 countenance dismissal of a complaint for imperfect statement of the legal theory supporting the  
 2 claim asserted.”).

3       The Court shall decide the appropriateness of any permanent injunctive relief after all of  
 4 the parties’ claims have been decided on the merits. Edmo v. Corizon, Inc., 935 F.3d 757, 801 (9th  
 5 Cir. 2019) (upholding lower court’s issuance of permanent injunctive relief after holding trial on  
 6 merits of the claims). These claims shall therefore be considered in the context of relief for the  
 7 related substantive claims alleged.

8                          **iv. Constructive Trust**

9       “A constructive trust is a remedial device by which the holder of legal title to property is  
 10 held to be a trustee of that property for the benefit of another who in good conscience is entitled to  
 11 it.” Locken v. Locken, 650 P.2d 803, 804 – 05 (Nev. 1985). Under Nevada law, “imposition of a  
 12 constructive trust requires: (1) that a confidential relationship exists between the parties; (2)  
 13 retention of legal title by the holder thereof against another would be inequitable; and (3) the  
 14 existence of such a trust is essential to the effectuation of justice.” Waldman v. Maini, 195 P.3d  
 15 850, 857 (Nev. 2008).

16       The Court finds that Defendant Karter has not adequately pled the elements for a  
 17 constructive trust to be imposed on his interest in Eightcig. Counter Defendants argue that the  
 18 claim is not valid because Karter does not plead that he has a confidential relationship with Magma  
 19 and Meta. Karter argues in response that Magma and Meta were the alter egos of Michael and  
 20 Daniel, with whom he undisputedly had a fiduciary relationship. However, Karter cites to no  
 21 binding Nevada law, nor could the Court locate any such law, that establishes that alter ego liability  
 22 allows a court to impute a fiduciary duty and confidential relationship from the alter ego to the  
 23 corporation for the purposes of satisfying the elements of a constructive trust claim. Accordingly,  
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1 the Court shall dismiss the constructive trust counterclaim, with leave to amend, if Karter can plead  
 2 facts demonstrating that he did in fact have a confidential relationship with Magma and Meta.  
 3

4                   **v. Alter Ego**

5                   To establish alter ego liability, a party must plead that: 1) a corporation is influenced and  
 6 governed by a person; 2) there is such unity of interest and ownership that the corporation and the  
 7 person are inseparable from each other; and 3) adherence to the notion of the corporation being an  
 8 entity separate from the person would sanction fraud or promote manifest injustice.” Nev. Rev.  
 9 Stat. § 78. 747.

10                  Factors the court may look at when examining whether a person is the alter ego of a  
 11 corporation include commingling of funds, undercapitalization, unauthorized diversion of funds;  
 12 treatment of corporate assets as the individual’s own; and failure to observe corporate formalities.

13                  LFC Marketing Grp, Inc. v. Loomis, 8 P.3d 841, 847 (Nev. 2000).

14                  The Court finds that Counter Claimant Karter has adequately pled that Counter Defendants  
 15 Magma and Meta are the alter egos of Third-Party Defendants Michael and Daniel. Karter pleads  
 16 in his complaint that Michael and Daniel had control of Magma and Meta and used this control to  
 17 improperly wire money to offshore accounts that they controlled personally. He also alleged that  
 18 they influenced and governed both corporations in terms of their operations but contrary to their  
 19 established corporate governance.

20                  Counter Defendants argue that because Karter also alleged that he was the CEO of Magma  
 21 and Meta, and was the sole founder, shareholder, corporate officer and director of both  
 22 organizations, he cannot adequately plead that the Third-Party Defendants are the alter egos of  
 23 Magma and Meta.

1           The Court disagrees. In the Countercomplaint, Karter pleads that as a minority shareholder  
 2 he was unable to stop Michael and Daniel's actions and that his signature on various documents  
 3 that justified or authorized the rollup of EightCig into Magma were forged. The Court does not  
 4 find, based on the facts alleged by Karter, that the mere fact that Karter was an officer in name  
 5 precludes a possible conclusion that Magma and Meta were in fact alter egos for Michael and  
 6 Daniel.

8           The Court also disregards Counter Defendants' arguments regarding whether Karter  
 9 adequately plead that Magma and Meta are undercapitalized, as the Nevada Supreme Court has  
 10 never indicated that undercapitalization is a necessary prerequisite for determining that a person is  
 11 the alter ego of a company. Loomis, 8 P.3d at 847 (noting that the factors the court may consider  
 12 are "not conclusive," and that "there is no litmus test for determining when the corporate fiction  
 13 should be disregarded; the result depends on the circumstances of each case.") (internal citations  
 14 omitted). The other factors militate toward a finding that Daniel and Michael are the alter egos of  
 15 Magma and Meta. Karter pleads facts sufficient to support a finding that there were unauthorized  
 16 diversions of funds, that corporate assets were treated as the individual's own, and that there was  
 17 a failure to observe corporate formalities. The Court shall allow this claim to proceed.

20           **vi. Claim for an Accounting.**

22           Both parties cite to the case Alexander v. Timberlake to allege the elements for a claim of  
 23 accounting. No. 2:07-cv-00590-RLH-GWF, 2008 WL 11452529 at \* 1 (D. Nev. Jan. 3, 2008). But  
 24 that case articulates the elements for a claim of accounting under New York law rather than Nevada  
 25 law. Id. at \*3 (applying Nevada choice of law rules and applying New York law to the state law  
 26 claims). The Nevada Supreme Court does not appear to have yet recognized a common law claim  
 27 for accounting nor is there a Nevada statute articulating the elements.  
 28

1           However federal common law recognizes accounting as an available equitable remedy.  
 2 An accounting remedy is similar to a damage remedy. Wright & Miller, Fed. Practice &  
 3 Procedure, § 2310. The courts of equity had jurisdiction to require an accounting under three  
 4 circumstances. Id. First, a court sitting in equity could require an accounting when the relationship  
 5 of the parties created an equitable duty of account. Id. citing Andersen, Meyer & Co. v. Fur &  
 6 Wool Trading Co., 14 F.2d 586 (9th Cir. 1926). Second, an equity court could act if “the  
 7 complicated nature of the accounts” would make it difficult, if not impossible, for a jury to unravel  
 8 the numerous transactions.” Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1966). Third, the court  
 9 could order an accounting on an otherwise legal claim if the request for an accounting was  
 10 incidental to a demand for an injunction or any other equitable form of relief. Wright & Miller,  
 11 Fed. Practice & Procedure, § 2310 (citing Root v. Lake Shore & M.S. Ry. Co., 105 U.S. 189).

14           Federal courts are courts of equity. Owner Operator Indep. Drivers Ass'n Inc. v. Swift  
 15 Transp. Co., Inc., 367 F.3d 1108, 1111 (9th Cir. 2004) (noting that federal courts have equity  
 16 jurisdiction which gives them the power “to do equity and to mould each decree to the necessities  
 17 of the particular case.”)(internal citations omitted).

19           The Court finds that both parties have serious disputes as to the nature of several  
 20 transactions made between the Counter Defendants and other entities. Accordingly, the Court finds  
 21 that it lies within its equitable jurisdiction to order an accounting, and the Court will allow Counter  
 22 Claimant Karter to proceed with a claim for accounting in this case.  
 23

24           **b. Motion to Appoint Receiver**

25           The Court finds that the non-exclusive factors under Canada River warrant the appointment  
 26 of a temporary receiver in this case.  
 27

1       The first factor supports the appointment of a temporary receiver. In the previous section  
2 of this order, the Court determined that Defendant Karter has pled legally plausible claims for civil  
3 conspiracy, unjust enrichment, alter ego, and injunctive relief for an accounting of the property at  
4 issue.

5       The second factor—whether there is fraudulent conduct or the probability of fraudulent  
6 conduct on the part of the party not moving for appointment—also supports the appointment of a  
7 receiver.

8       Defendant Karter has submitted credible allegations of possible fraud on the part of  
9 Plaintiffs. To support his motion, Karter submitted two declarations from a CPA. ECF No. 35-38,  
10 Greene Dec.; ECF No. 57-2; Suppl. Greene Dec. The CPA identified possible indicia of fraud  
11 including the lack of substantive documentation supporting alleged inventory purchases from third  
12 party vendors by Magma—including shipping documents or customs forms—and the payment by  
13 Magma of invoices that had been sent to Meta. The CPA also identified signatures and formatting  
14 on some agreements that suggested possible forgery.

15      In response, Plaintiffs submitted a declaration from their own expert and documentation  
16 purporting to substantiate several of the allegedly fraudulent transactions, including a  
17 supplemental declaration from Daniel. Having reviewed Plaintiffs' documents, however, the Court  
18 does not find that they necessarily vindicate Plaintiffs. Some of the documents are in untranslated  
19 Chinese. Others are lists with no explanations of their terms. Plaintiffs also attach 722 pages of  
20 packing lists and pro forma invoices that purport to establish and explain payments made from  
21 Magma to Troogle. But the pro forma invoices are not final invoices requesting payment, which  
22 would establish what goods were *actually* provided for in exchange for payment. They also do not  
23 include customs forms.

1 Plaintiffs also provide other “clarifying” documentation that does not actually clarify the  
2 purpose of some of the wire transfers. For example, Plaintiffs attach a text exchange between  
3 Karter and Daniel that supposedly establishes that the reasons for a March 25, 2019 wire transfer  
4 from Magma to Flamingo Technology, Limited was for “prepayment for Flamingo’s later  
5 provision of goods.” ECF No. Decl. of Qian Xu, 25 – 26. But in the text message exchange, Daniel  
6 instructs Karter to “plz wire 1 million usd to this account tmr morning.” When Karter asks why,  
7 Daniel responds, “They need 1m right now for branding.” Nothing about this text exchange  
8 establishes that the \$1 million is being sent as prepayment for goods.  
9

10 In another example, Plaintiffs explain in a declaration that a \$4 million payment to  
11 Flamingo was pursuant to a Tri-Partite Agreement that converted the payment into an investment  
12 by MOTI. But Plaintiffs do not actually attach the agreement.  
13

14 Finally, Daniel states in his declaration that there was no record found for a March 25, 2019  
15 of a \$1 million wire payment from Magma to Troogle. But while there does not appear to be a  
16 record of a \$1 million payment on that day, there does appear to be a record of a payment from  
17 Magma to Troogle for \$520,779.37. ECF No. 57-2, Suppl. Decl of Greene, 26. Daniel offers no  
18 explanation as to the purpose of that payment.  
19

20 There are also no invoices produced from Troogle to Meta, despite Meta’s wiring of  
21 \$1,449,364.89 to Troogle in 2019. Plaintiffs attach an email showing that Karter approved a  
22 payment of consulting fees to Daniel. ECF No. 53-24. But the emails do not establish that there  
23 was ever any arrangement that Magma would issue consulting fees to Daniel, and that Karter  
24 approved the request is not inconsistent with his allegation that this is one of many transactions he  
25 was asked to effectuate for which he sought explanation but did not receive any. The Court finds  
26  
27

1 these allegations and Plaintiffs' incomplete documentation in response to be sufficient to suggest  
2 possible fraud which again supports the appointment of a receiver.

3       The third factor—whether the property is in imminent danger of being lost, concealed,  
4 injured, diminished in value, or squandered, also weighs in favor of appointing a receiver.  
5 Defendant Karter alleges the third-party defendants are transferring funds from Magma and Meta  
6 to off-shore companies for their own personal use. He further alleges that when the Court issued  
7 its temporary restraining order, that an addition \$2.5 million in funds that became unfrozen may  
8 have been taken by plaintiffs for unauthorized use, and that plaintiff's counsel did not comply with  
9 defendant's request to not transfer \$2.5 million until after the Court's hearing on the since-expired  
10 TRO. Def.'s Opp. TRO 7 n.1 . Defendant Karter has also alleged efforts on the part of the third-  
11 party defendants to eschew personal service but remain engaged in the everyday operations of  
12 Plaintiffs Magma and Meta. These allegations are sufficient to support a finding that if Plaintiffs  
13 were to have access to the funds, there is a possibility that the funds could be concealed or lost by  
14 transfer to a foreign account in response to the litigation in this case.  
15

16       The fourth factor—whether legal remedies are inadequate, also weighs in favor of  
17 appointing of a receiver. Plaintiff argues that a legal remedy is adequate because Defendant Karter  
18 is seeking money damages, but Defendant Karter is also clearly seeking injunctive relief.  
19 Defendant Karter seeks to ensure that the value he allegedly retains in these companies is not  
20 mismanaged or squandered by Plaintiffs through improper financial transactions. This factor thus  
21 militates in favor of appointing a receiver.  
22

23       The fifth factor—whether the harm to the party moving for appointment of appointment  
24 outweighs the harm to the party opposing appointment is neutral. Under either party's version of  
25 events, significant harm occurs. If the receiver is not appointed and the funds are returned to  
26  
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1 Plaintiffs, then, according to Karter, his disputed interest in these companies would be severely  
2 harmed by the alleged fraudulent dissipation of resources which should be used to support the  
3 operation of the companies. Under Plaintiff's version of events, however, they could lose control  
4 over access to funds needed for their continued daily operating expenses.  
5

6 The sixth factor, whether the party moving for appointment has a likelihood of success on  
7 the merits—weighs slightly in favor of receiver appointment. The Court acknowledges that this is  
8 a case in which both parties vociferously refute the other side's factual allegations. This is also a  
9 case that will require significant credibility determinations on the part of the ultimate factfinder.  
10 However, based upon the documentation thus far and the Plaintiffs' incomplete responses to some  
11 of Karter's most serious allegations, the Court finds Karter has a likelihood of success on the merits  
12 on some of his substantive claims.  
13

14 The Court finally finds that the seventh factor—whether the moving party's interest will  
15 be well-served by receivership—also weighs in favor of appointment. Appointing a receiver will  
16 allow an independent entity to manage the funds while the claims are adjudicated, which is in  
17 Karter's interest.  
18

19 The Court acknowledges that the decision to appoint a receiver must not be taken lightly.  
20 But the Ninth Circuit has recognized that appointment of a receiver may be necessary in cases of  
21 possible fraud. See S.E.C. v. Wencke, 622 F.2d 1363, 1366 (9th Cir. 1980) (noting that a temporary  
22 receiver may be appointed to “take custody of and conserve whatever assets might remain for  
23 defrauded public investigations until he could fully investigate the complex corporate relationships  
24 [in the case]”). The Court also notes that the “appointment of a receiver . . . is [an] ancillary remedy  
25 that does not affect the action’s ultimate outcome.” Canada Life, 563 F.3d at 843. The Court thus  
26 concludes that the temporary appointment of a receiver is necessary.  
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28

The Court has reviewed the parties' list of receivers and objections to those receivers. The Court appoints Kevin Singer as the receiver, as the parties have stipulated.

## V. CONCLUSION

**IT IS THEREFORE ORDERED** that Defendant Ka Tat “Karter” Au-Yeung’s Motion to Appoint Receiver (ECF No. 36) is GRANTED. Kevin Singer of Receivership Specialists located at 7251 W. Lake Mead Blvd., Suite 300, Las Vegas, Nevada 89128, Phone: (702) 562-4230. This appointment is effective as of April 24, 2020. The Receiver may begin the process of reviewing the disputed claims of the parties in this case and formulating a plan for addressing them to present to the Court.

**IT IS FURTHER ORDERED** that Defendant Ka Tat “Karter” Au-Yeung’s Motion for Leave to File Excess Pages (ECF No. 34) is GRANTED nunc pro tunc.

**IT IS FURTHER ORDERED** that Counter Defendants/Plaintiffs Magma Holding, Inc. and Meta Lab's Motion to Dismiss the Amended Countercomplaint (ECF No. 49) is granted in part. The Court dismisses Counter Claimant/Defendant Ka Tat "Karter" Au-Yeung's claim for a constructive trust without prejudice.

**IT IS FURTHER ORDERED** that Plaintiff Magma Holding, Inc's Motion to Extend Temporary Restraining Order (ECF No. 58) is DENIED.

**IT IS FURTHER ORDERED** that Plaintiffs' Motion for Leave to File Supplement to Motion for TRO and Order to Show Cause re Preliminary Injunction (ECF No. 66) is denied.

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1           **IT IS FURTHER ORDERED** that a videoconference hearing addressing the parameters  
2 of the temporary receivership and the complete assets that will fall under the control of the  
3 Receiver is scheduled for **Wednesday, April 29 at 10:30 AM** in LV Courtroom 7C before Judge  
4 Richard F. Boulware, II.

5           **DATED: April 24, 2020.**



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7           **RICHARD F. BOULWARE, II**  
8           **UNITED STATES DISTRICT JUDGE**

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